United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1042

To be argued by
PHYLIS SKLOOT BAMBERGER

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

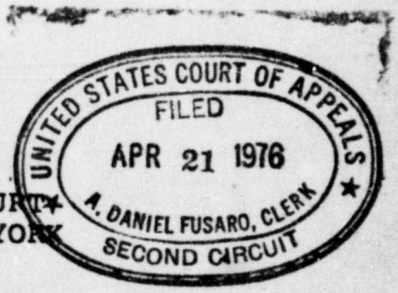
-against-

FERNANDO PADRON, RUBEN LOPEZ, and WALTER SINTSCHA,

Defendants-Appellants.

Docket No. 76-1042

BRIEF FOR APPELLANT
FERNANDO PADRON



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CASE CITED

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BRIEF FOR APPELLANT FERNANDO PADRON

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the refusal of the District Judge to examine the notes on the prosecution table requires a vacature of the judgment and a remand.

2. Whether the instruction on the dangerousness of conspiracy was error.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Milton Pollack) rendered on January 28, 1976, convicting appellant Fernando Padron of conspiracy to possess drugs with intent to distribute (Count One).[1] Padron was sentenced as a young adult offender pursuant to 18 U.S.C. §5010(b) to serve six months' imprisonment with a three-year period of probation and a three-year term of special parole. The probation and parole terms are to run concurrently. Mr. Padron is free on bail pending appeal.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel for appellant Padron on appeal, pursuant to the Criminal Justice Act.

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[1]The indictment is B to appellants' joint separate appendix. In addition to the conspiracy count, it contained seven counts charging substantive violations of the narcotics laws. Appellant Padron was charged in Count Four with possession of drugs with intent to distribute on July 25, 1975. However, on a defense motion, renewed at the close of the Government's case, the count was dismissed for lack of venue (Tr. 326). See memorandum order endorsed on Document #16 to the record on appeal.

Statement of Facts

The indictment charged that appellant Fernando Padron, Edward Montiell, Ruben Lopez ("John"), Walter Sintscha, and Armando Delbarrio[2] were engaged in a scheme to sell cocaine.

The primary witness for the Government was Stephen Caracappa, a New York City police officer working with the Joint Task Force.[3] On July 10, 1975, a confidential informer introduced Caracappa to defendant Sintscha. That day Sintscha obtained for Caracappa 1/4 ounce of cocaine. The cocaine was delivered to Caracappa in Sintscha's bedroom in the apartment at 66 West 84th Street which he shared with Ruben Lopez (267[4]). Caracappa paid $475 for the drugs, which he had in the trunk of the official Government vehicle parked nearby. Sintscha offered to sell Caracappa more cocaine (137-140; 142; 18-19).

On July 22, 1975, Caracappa telephoned Sintscha to discuss the sale of an ounce of cocaine for $1,600.[5] Later they

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[2]On November 19, 1975, prior to trial, Delbarrio pleaded guilty to the substantive counts charged in Counts Four and Six. See docket sheet, A to appellants' joint separate appendix, and Document #31 to the record on appeal.

[3]Caracappa's testimony was corroborated by surveillance agents. The most important Federal agent on the case was Patrick Bradley, who was also the key surveillance agent. See fn.10, infra, at 10.

[4]Numerals in parentheses refer to pages of the transcript of the trial.

[5]This conversation was recorded. The tape (Government Exhibit #3) and the transcript (Government Exhibit #3A) were before the jurors (144).

met to discuss the deal (21, 144). Sintscha said he would get four to six ounces of cocaine by Friday, July 25 (144).

On July 23, 1975, defendant Lopez was seen at about 6:00 p.m. driving in Sintscha's blue Toyota to the Queens midtown tunnel (22-25). At 8:00 p.m., the Toyota was near Sintscha's home (25). Later Sintscha learned the drugs were in his apartment at 66 West 84th Street. Sintscha got the package and gave it to Caracappa, who paid for it with $1,600 which had been in the trunk of the Government car (148-149).

On July 24, 1975, Caracappa went to Sintscha's apartment and was admitted by appellant Padron (150). Padron said he had some cocaine to sell but, said Padron, since Caracappa was Sintscha's customer, Padron was reluctant to discuss price (150). Sintscha then arrived and told Caracappa that the following day he would have a 4-ounce package of cocaine from Manhattan, at a cost of $4,800, and a similar size package from Queens priced at $3,500 (150-151).

On July 25, 1975, Sintscha and Caracappa drove to Queens in separate cars. They met appellant Padron at a Queens gas station. Padron made a telephone call and then stated that the connection would arrive in a few minutes (151-152).

Padron then spoke to Armando Delbarrio, who arrived in a red Datsun. Padron reported to Caracappa that Delbarrio and Padron would go and get the four ounces and would conduct the transfer in the street. Caracappa refused to deal in that manner, and after Padron held a second conference with Delbarrio.

Padron then announced that the transfer would occur at Delbarrio's apartment (153).

At the apartment Delbarrio and Agent Caracappa discussed a deal involving three kilograms of cocaine. Delbarrio said he had a direct connection in Florida and could do more business through Padron and Sintscha (153).

Defendant Edward Montiell[6] arrived with a package of cocaine. Since it was short weight, Delbarrio agreed to sell it for $5,000 (154).[7]

On July 31 and August 5, Caracappa and Sintscha discussed future transactions. Sintscha stated he was not going to use Queens people for the transaction, but the first people they had dealt with (Government Exhibits #7 and #7A).

On August 6, 1975, Sintscha introduced Caracappa to defendant Ruben Lopez. Lopez said he was Sintscha's connection, and offered to sell 1/2 kilogram of cocaine (161). Caracappa said he could purchase only two ounces off the top. Lopez wanted payment in advance to pay his own connection, but Caracappa refused that type of transaction (162).

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[6]Montiell produced evidence that he was a Government informer (56, 65, 178-180), a fact unknown to Agent Caracappa. In rebuttal, the Government produced the testimony of Agent Haywood, who confirmed that Montiell was an informer, although not a very good one (274-286). After deliberations, the jury acquitted Montiell (494).

[7]This transaction had been set up in earlier telephone calls between Caracappa and Sintscha (Government Exhibits #4 and #4A).

On August 7, two plastic baggies containing cocaine were transferred at Sintscha's apartment for $3,000 (163). Conversation turned to possible future transactions, with Caracappa rejecting any suggestion of advance payments (163).

On August 18, after several earlier discussions, Caracappa met with Lopez and Sintscha at 23rd Street and Second Avenue, the building of Lopez' and Sintscha's new apartment. Caracappa showed them $18,000 he had in the trunk of his car for the purchase of 1/2 pound of cocaine (167). Sintscha and Caracappa entered 321 East 23rd Street, while Lopez drove to Queens (36). Lopez entered a particular building and, through the buzzer system, announced himself as Ruben (37). Lopez returned to the 23rd Street apartment and reported that the connection was to come to the apartment later with the cocaine. However, Lopez subsequently told Sintscha that the deal could not be completed until the next night (167).[8]

On August 19, 25, and 28, further conversations were held between Caracappa and Sintscha, but no transactions occurred (37-41, 167-170).

On September 4, Sintscha told Caracappa in a telephone conversation (Government Exhibits #11 and #11A) that the connection, who was from Queens, wanted to see the money for the drugs in a public place in Manhattan. The connection would

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[8]Apparently a police radio car was in the area at the time the connection was to appear (168).

then pick up the package. The deal was later called off (171-172).

On September 9, Sintscha said he would have a package the following day (43-44, 172). On September 10 Sintscha delivered 1/4 pound of cocaine to Caracappa, and was arrested when he accompanied Caracappa to the Government car to get the money for payment (44-46, 173). Sintscha gave Caracappa keys to the 23rd Street apartment, and Lopez was arrested there (45-46).

After having no contact with appellant Padron since July 25, on September 10, 1975, Caracappa called Padron at his home in Union City, New Jersey (261), and spoke with him. At 2:30 a.m. on September 11, Padron was arrested at his home (51, 262) when the door was opened by Padron's elderly father (51).

At 12:15 p.m. (see Exhibit 3559 for identification), some ten hours after arrest and prior to arraignment before a U.S. Magistrate (295), Padron was interviewed in an Assistant U.S. Attorney's office (291). In a statement given to the Assistant U.S. Attorney, Padron said he was at Delbarrio's house in Queens with Caracappa and Sintscha (292) where they started to "bull" about drugs, alcohol, guns, and war, and Steve (Agent Caracappa) said he wanted to buy some cocaine (291).

In his charge to the jury,[9] Judge Pollack stated:

> The indictment charges all of the defendants on trial before you with violations of the federal narcotics laws. The Comprehensive

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[9]The complete charge is C to appellants' joint separate appendix.

> Drug Abuse Prevention Act of 1970 was passed by Congress because of concern with the illegal importation and distribution or possession of narcotics drugs with a view to distribution which have a substantial and detrimental effect on the health and welfare of our people....
>
> (453).
>
> A conspiracy which sometimes is referred to as a partnership in crime is so referred to because it involves collective or organized action, presents a greater potential threat to the public interest than the illicit activity of a single individual. Group association or organized activity renders detection more difficult than the instance of a single or lone wrong doer. It was for these reasons and other reasons that Congress made a conspiracy or concerted action to violate a general law a crime, entirely separate, distinct and different from the violation of the law or laws which may be the objective of the conspiracy.
>
> (455-456).

At the conclusion of the charge, counsel for Padron objected to both of the instructions (484). Judge Pollack refused any corrective charges (484).

The jury convicted appellant Padron.

After the trial, counsel for Lopez filed a motion requesting relief based on his observations that all of surveillance agent Bradley's notes had not been turned over to the defense as had been requested during trial. These observations took place during the jurors' deliberations when counsel saw at the place where Bradley had sat during trial a question and answer form relating to Bradley's testimony. Counsel requested a hearing to determine whether the materials came within "3500"

material (see Document #27 to the record on appeal, F to appellants' joint separate appendix). In a responsive affidavit, the Assistant U.S. Attorney alleged that the notes were the "traditional prosecutor's witness outline" used for trial. The prosecutor offered to produce them if the District Court desired it (see Document #28 to the record on appeal, G to appellants' joint separate appendix). Judge Pollack denied the motion.

ARGUMENT

Point I

THE REFUSAL OF THE DISTRICT JUDGE TO EXAMINE THE NOTES ON THE PROSECUTION TABLE REQUIRES VACATURE OF THE JUDGMENT AND A REMAND.

During the trial defense counsel attempted to make certain that they had seen all "3500" material (71-73). On the cross-examination of Bradley,[10] counsel inquired whether he had all of Bradley's reports and notes. Bradley replied that what he had used to prepare his testimony were the notes in front of the prosecutor. The prosecutor said counsel had all the notes (74). Thus, counsel for Lopez was moved to take action when, during the jury's deliberations, he saw a set of documents which appeared to contain a written version of Agent Bradley's testimony -- notes defense counsel had not previously seen. The relief sought by defense counsel in a post-verdict motion was an examination of the material to determine whether counsel was entitled to it and whether the failure to reveal the documents required a new trial. Interestingly, counsel for the Government did not object to producing the notes for in camera review by the court. However, the District Judge nonetheless denied the application.

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[10]Bradley was the first Government witness, the most important surveillance agent, and the chief Federal narcotics agent on the case. See Court Exhibit #1, in which the Government states that Bradley was the "only guy who prepared the case."

In Goldberg v. United States, 44 U.S.L.W. 4424 (Sup. Ct., March 30, 1976), the Supreme Court held that

> ... a writing prepared by the Government lawyer relating to the subject matter of the testimony of a Government witness that has been "signed or otherwise adopted or approved" by the Government witness is producible under the Jencks Act, and is not rendered nonproducible because a Government lawyer interviews the witness and writes the "statement."

Id., 44 U.S.L.W. at 4425.

The Court made clear that statements given to Government attorneys are included within "3500" and that the attorneys' work product exception is not relevant by the language of the statute or the legislative history to statements of witnesses if the statements are given to the Government attorney in preparation for trial.

It is notable that the Court distinguisnes between witnesses' statements taken by the attorney and notes of the Government attorney's own thoughts recorded in the interview notes. A record of the attorney's own thoughts is "work product."

Here, as in Goldberg, the District Court should have examined the notes and, if necessary, held a hearing to determine whether those notes included statements adopted by a witness as his own. Id., 44 U.S.L.W. at 4428, n.12.

As in Goldberg, the conviction here should be vacated:

> ... The District Court will supplement the record with findings and enter a

new final judgment of conviction if the court concludes after the inquiry to reaffirm its denial of petitioner's motion. This procedure will preserve petitioner's opportunity to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the material, or part of it, to petitioner, and that the error was not harmless,[21] the District Court will vacate the judgment of conviction and accord petitioner a new trial.

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[21]Since courts cannot "speculate whether [Jencks material' could have been utilized effectively" at trial, Clancy v. United States, 365 U.S. 315, 316 (1961), the harmless error doctrine must be strictly applied in Jencks Act cases....

Id., 44 U.S.L.W. at 4429.

Point II

THE INSTRUCTION ON THE DANGEROUSNESS OF CONSPIRACY WAS ERROR.

During the course of his charge, the District Judge instructed the jurors, as to the crime of conspiracy:

> A conspiracy which sometimes is referred to as a partnership in crime is so referred to because it involves collective or organized action, presents a greater potential threat to the public interest than the illicit activity of a single individual. Group association or organized activity renders detection more difficult than the instance of a single or lone wrong doer. It was for these reasons and other reasons that Congress made a conspiracy or concerted action to violate a general law a crime, entirely separate, distinct and different from the violation of the law or laws which may be the objective of the conspiracy.
>
> (455-456).

This instruction, properly objected to by Padron's trial counsel, placed the dangerousness to the community of the crime of conspiracy on a level greater than other crimes. Whatever the truthfulness of this statement or its significance to the legislative history or intent of the Congress, the effect of the comment was to make it appear to the jurors that condemnation of the crime of conspiracy was more important than condemnation of other crimes and that they therefore had a greater obligation to convict persons accused of conspiracy than to convict persons charged with other crimes. The emphasis on dangerousness injected an improper consideration into the

jurors' deliberations, for no matter what the crime charged, the jury is to consider only whether the evidence established the guilt of the defendant beyond a reasonable doubt. As with punishment, dangerousness is an irrelevant consideration for the jury.

Further, by advising the jurors that it was more difficult to detect a conspiracy than a crime committed by a lone individual, the District Judge inferentially told the jurors that the agents in this case had done a good job. The Judge thereby lent his support to a finding that the agents' testimony was truthful and accurate.

The charge given is clearly not necessary to define "conspiracy" or its elements. Nor does . . aid the jurors in an understanding of the nature of the fact finding process which they must undertake. Regardless of the validity of the statement as a matter of fact, it was simply not an appropriate addition to the charge. Since the statements were also prejudicial and were brought to the District Court's attention as error, the conviction should be reversed.

Point III

APPELLANT PADRON ADOPTS THE ARGUMENTS OF APPELLANTS LOPEZ AND SINTSCHA INSOFAR AS THEY ARE RELEVANT TO HIS CASE AND NOT INCONSISTENT WITH THE ARGUMENTS RAISED ON HIS BEHALF.

CONCLUSION

For the foregoing reasons, the judgment must be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted.

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CERTIFICATE OF SERVICE

April 21, 1976

I certify that a copy of this brief [redacted] has been mailed to each of the following:

The Honorable Robert B. Fiske, Jr.
United States Attorne
Southern District of New York

Lewis R. Friedman, Esq.,
Attorney for Appellant Ruben Lopez

Darnell J. Blackett, Esq.,
Attorney for Appellant Walter Sintscha

The appendix has been personally served on each.

Phyllis Sloan Koenberger